BRF246

92-1098

Supreme Court, U.S.
FILED
DEC 22 1992
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1992

ALAN DALE PHILLIPS, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOSEPH A. CONNORS III
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ATTORNEY FOR PETITIONER

December 22, 1992

QUESTION PRESENTED FOR REVIEW

The Court of Appeals reversibly erred in not sustaining petitioner's point of error no. 3, which read (Pet.App. 23):

> The trial court erred when it gave the Appellant a 2 level upward adjustment for possession of a weapon during a drug case. When the weapons, hand grenades, were found during a search of Appellant's home, they were not connected to the offense in which he was charged.

LIST OF ALL PARTIES BELOW

The original parties before the United States Court of Appeals for the Fifth Circuit: The United States of America and Petitioner Alan Dale Phillips.

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously come before this Court. Petitioner's undersigned counsel is not aware of any other related case pending before this Court.

IDENTITY OF DEFENSE COUNSEL BELOW

Petitioner Alan Dale Phillips was represented at trial by attorney David Garcia and Desiderio Trevino, Jr. of Edinburg, Texas. Trial counsel also represented Alan Dale Phillips on appeal.

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

ALAN DALE PHILLIPS, Petitioner

v.

THE UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

To the Honorable Supreme Court:

ALAN DALE PHILLIPS petitions for review of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

On September 2, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case. United States v. Phillips, No. 91-8558. This opinion is unreported (Pet.App. 3-9).

JURISDICTION

On September 2, 1992, the United States Court of Appeals for the Fifth Circuit entered its opinion affirming the judgment of conviction in this case (Pet. App. 3-9). On Setpember 24, 1992, the Court of Appeals denied a rehearing motion (Pet. App. 26). Jurisdiction of the Court is invoked under Section 1254(1), Title 28, United States Code.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The fifth amendment to the United States Constitution provides in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law; ...

Sentencing Commission Guideline § 2D1.1(b)(1) provides that:

> If a dangerous weapon (including a firearm) was possessed during

commission of the offense, increase by 2 levels.

Application Note 3 provides:

> The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet.

STATEMENT OF THE CASE

A. Appeal Court's Jurisdiction

The Court of Appeals had jurisdiction of petitioner's direct appeal by virtue of 28 U.S.C. 1291.

B. Procedural History in District Court

Petitioner, Alan Dale Phillips, was convicted of conspiracy to possess more than 1,000 kilograms of marijuana in violation of Title 21 U.S.C. Sec. 841(a)(1), and 846.

On October 11, 1991, the district court after considering the P.S.R. and testimony

of witnesses sentenced the Petitioner to 290 months in prison, a fine of $5,000, a five year supervised release term and $50 mandatory assessment (Pet. App. 10). The Court of Appeals affirmed the conviction.

C. Statement of Facts

This case began in central Texas approximately in March of 1989. A marijuana grower in Coryell County, Texas, by the name of Bobby Ray Ricks was arrested and charged with marijuana trafficking. In September of 1989 with information obtained from Ricks the Texas Department of Public Safety arrested Bobby Joe Blythe, Cortland Duffield and Robert Pernell French in a reverse role undercover investigation in Salado, Bell County, Texas. These arrests had nothing to do with Petitioner. All the above named people were given substantially reduced sentences for their cooperation and testimony in the case herein against Petitioner.

The Government called to the stand as their second witness Ricks. Ricks testified that he owned the Flying R Ranch which he used to grow marijuana indoors in a sophisticated greenhouse operation. Among other things Ricks said he supplied marijuana to French, Duffield, Thomas Flowers, and Terrance and Thomas Brennan, the latter three individuals being Petitioner's co-defendants. Ricks admitted he sold to French, Duffield, Flowers and Brennans' conspiracy, hereinafter called the Flowers group, roughly four hundred (400) pounds total. The Flowers group paid two-thirds of the money "up front" and later paid the remainder when the marijuana was sold.

After being arrested Ricks agreed to cooperate and allowed case agent John Bennett, an Investigator with the Texas Department of Public Safety, to pose as a marijuana broker in order to lure French and

Duffield into a purchase of two hundred fifty (250) pounds of marijuana. At Salado, Texas, Blythe, French and Duffield were arrested when they attempted to purchase the 250 pounds of marijuana. The three had in excess of eighty thousand ($80,000) dollars. When Ricks was asked by prosecutor John Phinizy if Ricks knew Petitioner Alan Dale Phillips, Ricks replied: "I do not." In fact, Ricks went on to testify that he had "never seen him (Phillips) before." Later on cross-examination Ricks added that he had never spoken to Petitioner Phillips on the phone.

Blythe testified he did not know whose money it was, but that Duffield said it came from Petitioner. Blythe and Duffield testified at trial against Petitioner. They testified about two alleged transactions between themselves and Petitioner. Their testimony about the negotiations varied substantially, so much so that their

testimony did not corroborate or substantiate each other.

On June 13, 1990, the indictment's last day of the alleged conspiracy of conviction (P.S.R. at p. 28), a search warrant was executed on Petitioner's residence located at 4837 Azalia Garden Road in Norfolk, Virginia. Petitioner was present at the time of execution of the search warrant. Items seized were three bags containing cocaine and two live TNT hand grenades. Petitioner's sentence was enhanced two (2) points for possession of those weapons.

SUMMARY OF ARGUMENT ON REASONS FOR REVIEW

Under Supreme Court Rule 10.1(a), the Supreme Court should exercise its judicial discretion and allow the writ in this case because the Fifth Circuit of Appeals has rendered a decision consistent with United States v. Vasquez, 874 F.2d 250 (CA5 1989) and United States v. Aguilera-Zapata, 901

F.2d 1209 (CA5 1990), but in conflict on the same matter with the decision in United States v. Khang, 904 F.2d 1219 (CA8 1990).

ARGUMENT ON QUESTION

This issue's resolution turns on whether the Fifth Circuit's review of the application of Sentencing Guidelines § 2D1.1(b)(1) adequately safeguard an accused's right to due process. The Fifth Circuit, as other circuits, holds that the findings of fact of the district court are reviewed under the "clearly erroneous" standard. United States v. Mourning, 914 F.2d 699, 704 (CA5 1990). Following the Eighth Circuit's opinion in United States v. Khang, it is clear that the Fifth Circuit erred in ruling that the trial court's enhancement of Petitioner's sentencing was proper under the Sentencing Guidelines.

Section 2D1.1(b)(1) of the Guidelines provides that if a firearm or other dangerous weapon is possessed during the

commission of a drug related offense, the offense level is increased by two levels. Application Note 3 under the same section states that the enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment is to be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense.

As pointed out in Khang at 1222:

> The Sentencing Guidelines must be strictly construed. Dowling v. United States, 473 U.S. 207, 216, 105 S.Ct. 3127, 3132, 87 L.Ed.2d 152, 159 (1985); Williams v. United States, 458 U.S. 279, 290, 102 S.Ct 3088, 3094, 73 L.Ed.2d 767 (1982); La Fave & Scott, Substantive Criminal Law § 2.2(d) (1986); Wharton & Anderson, Criminal Law and Procedure § 19 (1966). Chief Justice Marshall early observed:
>
> > The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain

> principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

United States v. Wiltberger, 4 Wheat. 76, 95, 5 L.Ed. 37 (1820).

Guideline Sentencing is an adversarial proceeding. Khang at 1222; United States v. Scroggin, 880 F.2d 1204, 1209 (CA11 1989). As such, the burden of proof falls on the party asserting the sentencing adjustment. In this instance, the Government would bear the burden of proving that the weapon was "possessed during the commission of the offense" or that the weapon was "present" and that it is probable that the weapon was "connected with the offense." This burden does not shift to the accused, for it is established that the accused only bears the burden of proving the applicability of guideline sections which would reduce the offense level. Khang at 1222; see also,

United States v. Wilson, 884 F.2d 1355, 1356 (CA11 1989).

The Eighth Circuit also pointed out that the Sentencing Commission established the Guidelines so that there could be honesty, uniformity, and proportionality in sentencing. Khang at 1223. Because of these issues, the aggravating nature of U.S.S.G. § 2D1.1(b)(1), the strict interpretation of penal statutes, and the intent of Congress in developing the Guidelines and the specific offense characteristics, the Eighth Circuit ruled that the government must establish a relationship between a defendant's possession of the firearm and the offense which he or she has committed. That Court ruled that the mere presence in the defendant's residence of a loaded firearm near an opium stash was not sufficient to justify enhancing the defendant's sentence for importation of opium. Khang at 1223.

There, the government had stated at sentencing that the firearm had no relationship to the offense for which the defendant had pled guilty, and the probation office had not added any new evidence from an independent investigation. Khang at 1223. That Court disagreed that the burden of persuasion for disproving the enhancement fell on the defendant. Khang at 1223, footnote 7.

Although the Government has not conceded that the grenades were not connected with Petitioner's convicted offense, the Government has not sustained its proof burden in this case. There was no evidence showing when the grenades were obtained, or that they were possessed during commission of the conspiracy of conviction. It was not up to the Petitioner to prove otherwise. No conspiratorial act of Petitioner occurred on June 13, 1990. That

day, his home was searched and the grenades but no marihuana was found. Thus the Government presented no evidence to prove it was clearly probable that the grenades were connected with and possessed by Petitioner during the commision of the marijuana conspiracy.

CONCLUSION

For the foregoing compelling reasons, this Court should grant this petition for writ of certiorari.

DATED: December 22, 1992.

Respectfully submitted by
Petitioner's Attorneys,

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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IN THE SUPREME COURT OF THE UNITED STATES
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ALAN DALE PHILLIPS, PETITIONER

VS.

UNITED STATES OF AMERICA, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX TO PETITION

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ATTORNEY FOR PETITIONER

December 22, 1992

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-8579
(Summary Calendar)

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

V.

ALAN DALE PHILLIPS,
Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(W-90-CR-100 (4))

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM:*

Having been sentenced to 290 months imprisonment and other penalties after being found guilty of conspiracy to possess more than 1,000 kilograms of marijuana with intent to distribute, appellant Phillips raises five points on appeal, none of which have merit.

Appellant, relying upon a selective review of the evidence at trial, first contends that he evidence is insufficient to support his conviction. As appellant's brief acknowledges, we review the evidence in the light most favorable to the government, and in particular, a defendant's knowing participation in a conspiracy may be proved by circumstantial evidence. Testimony of a co-conspirator linked Phillips directly with a 250 pound purchase of marijuana, as he contends, was involved in only one side dealer in the full scope of the Thomas Brennan-Flowers conspiracy, and they found against him. There is no legal basis to overturn that decision.

Phillips next contends that the trial court erred in not granting a mistrial after co-defendants Thomas and Terrance Brennan had pled guilty. Denial of a motion for mistrial constitutes reversible error only when the district court has abused its

discretion. United States v. Gollott, 939 F.2d 255, 259 (5th Cir. 1991). Phillips's contention that he was inherently prejudiced because other co-defendants pled guilty after the jury was impanelled but before testimony began is simply unpersuasive. The district court carefully instructed the jury that those defendants' absence could be attributed to any number of factors and should be disregarded during the further progress of the case. PHillips did not object to this instruction, and it is certainly no plainly erroneous. No mistrial was warranted.

The trial court's two-level increase in a base sentencing level for possession of deadly weapons constitutes the next basis for this appeal. Phillips contends that the two live hand grenades found at his residence when the search warrant was executed were not shown to have been connected with the charged offense. At

sentencing, however, he presented no evidence that it was "clearly improbable that he weapon was connected to the offense. At sentencing, however, he presented no evidence that it was "clearly improbable that the weapon was connected to the offense." U.S.S.G. Commentary to § 2D.1.1(b). The hand grenades were seized within the period of conspiracy, and trial testimony established that shipments of marijuana were going to Phillips in Virginia. The district court did not err in this finding.

Phillips next contends that the tiral court erred in not striking for cause three prosepective jurors who stated that they had known or seen persons whose lives had been hurt by drug abuse, and the court improperly failed to give Phillips more peremptory strikes. Both of these alleged errors are reviewed for abuse of discretion, which Phillips has failed to demonstrate. He does not show how any of these jurors, none of

whom participated in the jury panel, would have been to biased to serve. United States v. Gordon, 812 F.2d 965, 970 (5th Cir.), cert, denied, 483 U.S. 1009 (1987). He has not demonstrated wither that the trial court deprived him of peremptory challenges to which he was clearly entitled or that "the jury as finally selected was other than representative and impartial." United States v. Hooper, 575 F.2d 496, 498 (5th Cir.), cert, denied, 439 U.S. 895 (1978) (internal quotations omitted).

Phillips finally levels a number of challenges to the information contained in the PSR that justified a base offense level of 34. At the sentencing hearing, however, although his attorney cross-examined the government witnesses, Phillips introduced no evidence to contradict the PSR, and his written objections to it amounted to general denials. Phillips orated to the court concerning his numerous complaints about the

PSR and the evidence at trial, but as his declarations were unsworn, the court was not required to credit them. Given the lack of controverting evidence and the testimony offered for the government at sentencing, the district court was free to adopt the facts contained in the PSR. United States v. Mir, 919 F.2d 940, 943 (5th Cir. 1990).

The judgment and sentence of the trial court are AFFIRMED.

FOOTNOTES

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

UNITED STATES DISTRICT COURT
Western District of Texas
Waco Division

UNITED STATES OF AMERICA

V.

ALAN DALE PHILLIPS

JUDGMENT IN A CRIMINAL CASE
(For Offense Committed On or After November 1, 1987)

Case Number: W-90-CR-100 (4)

DAVID GARCIA and DESIDERIO TREVINO, JR.
Defendant's Attorneys

THE DEFENDANT:

___ pleaded guilty to count(s) _____

X was found guilty on Count S1 of the Indictment on June 28, 1991 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 841(a)(1) and 846	Conspiracy to possess with more than 1,000 kilograms of marijuana with intent to distribute	06/31/90	S1

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

___ The defendant has been found not guilty on count(s) _____ and is discharged as to such count(s).

___ Count(s) _____ (is)(are) dismissed on the motion of the United States.

_X_ It is ordered that the defendant shall pay a special assessment of $50.00, for Count S1 , which shall be due _X_ immediately ___ as follows:

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 227-78-8961

Defendant's Date of Birth: July 16, 1952

Defendant's Mailing Address:

9311 Phillips Avenue
Norfolk, Virginia 23503

Defendant's Residence Address:

Same as mailing address

October 16, 1992
Date of Imposition of Sentence

/s/ Walter S. Smith, Jr.
Signature of Judicial Officer

WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

October 16, 1991
Date

Defendant: ALAN DALE PHILLIPS
Case Number: W-90-CR-100(4)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of two-hundred and ninety (290) months.

X The Court makes the following recommendations to the Bureau of Prisons:

The Court recommends commitment to the Federal Correctional Institution at Virginia Beach, Virginia.

X The defendant is remanded to the custody of the United States marshal.

___ The defendant shall surrender to the United States marshal for this district.

___ at _____ a.m. / p.m. on _____.

___ as notified by the United States marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____.

___ as notified by the United States marshal.

___ as notified by the probation office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____, with a certified copy of this judgment.

_____
United States Marshal

BY _____
Deputy Marshal

Defendant: ALAN DALE PHILLIPS
Case Number: W-90-CR-100(4)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another federal, state, or local crime and shall not illegally possess a controlled substance; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this Court (set forth below); and shall comply with the following additional conditions:

X If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

X The defendant shall not own or possess a firearm or destructive device

X The defendant shall participate in a drug aftercare program as approved by the United States Probation Officer for substance abuse which may include testing to determine whether the

defendant has reverted to the use of drugs.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such

substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or persons history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement;

14) the defendant shall not use or possess methadone for treatment purposes or in any other manner, shape, or form without express authority of the Court.

Defendant: ALAN DALE PHILLIPS
Case Number: W-90-CR-100(4)

FINE

The defendant shall pay a fine of $5,000.00. This fine includes any costs of incarceration and supervision.

The Court has determined that the defendant does not have the ability to pay interest, and it is accordingly ordered that the interest requirement is waived.

This fine shall be paid during the term of supervised release as directed by the United States Probation Officer.

Defendant: ALAN DALE PHILLIPS
Case Number: W-90-CR-100(4)

STATEMENT OF REASONS

X The court adopts the factual findings and guideline application in the presentence report.

OR

___ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 36

Criminal History Category: III

Imprisonment Range: 235 to 293 months

Supervised Release Range: 3 to 5 years

Fine Range: $25,000 to $1,000,000

X Fine is waived or is below the guideline, because of the defendant's inability to pay.

Restitution: $ -0-

___ Full restitution is not ordered for the following reason(s):

X The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason

dto depart from the sentence called for by application of the guidelines.

OR

_X_ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

Level of involvement; prior record.

OR

The sentence departs from the guideline range

___ upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reason(s):

NO. 91-8579

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPEAL OF CRIMINAL NO. W-90-CR-100 (4)

FROM UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF TEXAS McALLEN DIVISION

THE UNITED STATES OF AMERICA,
PLAINTIFF-APPELLEE

VS.

ALAN DALE PHILLIPS,
DEFENDANT-APPELLANT

[Note: In that brief, the appellant's eight points of error read as follows: see next page]

POINT OF ERROR NO. 1

The trial court erred in that there was insufficient evidence to prove that Appellant Alan Dale Phillips did unlawfully, willfully and knowingly combine, conspire, confederate, and agree to possess with intent to distribute more than 1,000 kilograms of marijuana.

POINT OF ERROR NO. 2

The evidence is insufficient to prove Defendant did unlawfully, willfully and knowingly combine, conspire, confederate and agree to possess with intent to distribute more than 1,000 kilograms of marijuana.

POINT OF ERROR NO. 3

The trial court erred when it gave the Appellant a 2 level upward adjustment for possession of a weapon during a drug case. When the weapons, hand grenades, were found during a search of Appellant's home, they were not connected to the offense in which he was charged.

POINT OF ERROR NO. 4

The trial court erred in not granting appellant's motion for mistrial when the other two defendants in the case entered a guilty plea, since there was sufficient harm in seeing appellant alone at the defense table.

POINT OF ERROR NO. 5

The trial court erred in not granting appellant's motion for mistrial when the other two defendants in the case entered a

guilty plea, since the trial court's instruction prejudiced the appellant.

POINT OF ERROR NO. 6

The trial court reversibly erred by not granting appellant's counsel additional peremptory challenged because:

a. The court kept jurors who should have been struck for cause.

b. Co-defendants counsels exercised some of the strikes, defendant was entitled to.

POINT OF ERROR NO. 7

The trial court reversibly erred in calculating the appellant's guideline at 34 because:

a. The court's decision is based partly on statistical projections, which violate appellant's basic due process rights.

b. The court's decision is based partly on statistical projections which violate appellant's basic confrontation rights.

c. The level of the appellant's participation does not justify a level 34.

POINT OF ERROR NO. 8

The trial court reversibly erred in assessing appellant's punishment at such a high level based upon relevant conduct evidence which the court should not have considered, namely:

a. Unreliable hearsay evidence.

b. Statistical projections.

c. Evidence barred by ex post facto considerations.

d. Defendant assertion of a constitutional right.

e. Irrelevant evidence.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-8579

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALAN DALE PHILLIPS,

Defendant-Appellant.

Appeal from the United States District Court
for the
Western District of Texas

ON PETITION FOR REHEARING

(September 24, 1992)

Before JONES, DUHE and WIENER, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the Petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Edith H. Jones 9/28/92
United States Circuit Judge